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DRAFT CONVENTION ON ASSIGNMENT [IN RECEIVABLES FINANCING] [OF RECEIVABLES IN INTERNATIONAL TRADE]

Compilation of comments by Governments and international organizations

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SINGAPORE

[Original: English]

I. GENERAL COMMENTS

As a developing country, Singapore strongly supports the preparation of this draft Convention which is designed to increase the availability of credit at lower cost. The availability of credit is often a critical factor in the development strategies of developing countries. Any initiative to enhance this is therefore to be welcomed. Singapore also notes and strongly supports the underlying principles of this draft Convention, viz. the requirements of internationality, the respect for party autonomy and the strong concerns over consumer and debtor protection. Fundamental to the proposals contained in the draft Convention is the principle that it should not adversely affect existing modalities of doing business and, especially, existing banking and financial practices. The draft Convention is designed to facilitate international trade, generate prosperity and improve the lives of people of the nations of the world in a manner consistent with international law. This principle should always be maintained.

II. SPECIFIC COMMENTS

Title

As the proposals contained in the draft Convention have now gone beyond merely addressing the assignments of receivables for the purpose of obtaining financing, the original title is no longer relevant. However, the draft Convention very clearly is now designed to address issues arising from assignment of receivables which arise from trading activities, and not all receivables. As such, the title "Convention on Assignment of Receivables in International Trade" is to be preferred.

Non-Contractual Receivables (article 2 (a))

Singapore would prefer to limit the scope of the draft Convention to contractual receivables. If the draft Convention is to extend to non-contractual receivables, then those other types of receivables should be carefully defined. They should not, under any circumstances, include tort receivables. To do so would be to encourage litigation and contravene the public policy of countries who are opposed to excessive litigation.

Limitations on assignment of receivables other than trade receivables (article 5)

It has become clear that various articles in the draft Convention would adversely affect established transactions in the banking and financial sectors. These provisions may also be

inconsistent with other United Nations Conventions. There is, therefore, an imperative that these established practices be either excluded totally from the ambit of the proposed draft Convention, or that it be carefully prescribed that certain terms of the draft Convention would not apply to them.

Of particular concern are articles 11 and 12. These articles affect a number of established practices in the banking and financial sectors. They would, for example, affect severely the established practice of "netting" in financial transactions. Singapore, therefore, prefers that transactions which may be adversely affected by the proposed draft Convention be excluded from its operation. In this regard, if a choice is to be made based on wording proposed by the Working Group. Variant B of the proposed article 5 would, with appropriate modifications, be preferred over variant A.

"Location" (article 6 (i))

It is of crucial importance that the location of a person be determined with certainty as location determines the applicable law. Failure to determine "location" with certainty undermines the draft Convention, since the entire purpose of the draft Convention, which is to enable certainty in the legal regime governing assignments of receivables, will be defeated. Singapore's clear preference would be for "location" to be determined by objective factors such as place of registration/incorporation, or place where the head office (if any) of a business is located. It is noted that many jurisdictions have established rules for the determining of "location" of a business entity and that it is not desirable to have different rules applicable for different purposes. The solution, therefore, is to attempt to arrive at a formulation which would enable the "location" of a party to be determined by the most objective and transparent factors which can be agreed upon. In this context, it is to be noted that even a concept such as "place of central administration" can often require subjective determination.

Special consideration must be attached to the "location" of branches of banks (including branches of financial institutions who do not qualify under the strict legal definition of "bank"). It is noteworthy that in many jurisdictions foreign banks can operate either as branches, in which case they operate under the same legal personality as the head office, or as separate legal entities incorporated under the law of that jurisdiction. Consideration should be given to whether these should be treated in a similar manner as regards the issue of their "location". The principle to be adopted in determining the "location" of these entities must be one which would not compromise existing realities in the commercial marketplace.

Public policy and preferential rights (article 25)

The phrase "*only if that provision is manifestly contrary*" in article 25 (1) is unclear and may be interpreted differently in different jurisdictions. This would lead to the draft Convention having different degrees of application in different forum States. Singapore prefers that this phrase be deleted and substituted with the phrase "*... if that provision is contrary ...*".

With regard to article 25 (2), States should be left with the option of depositing a declaration identifying preferential rights. To require States to make such a declaration would, for some States,

empower the public officials who are responsible for formulating and filing the declaration to, in effect, make a judicial determination as to what the order of priorities is for that jurisdiction. This may be notwithstanding that the order of conflicting "super-priorities" may not as yet have been judicially determined by the Courts of that jurisdiction. Conferring such powers on public officials would be contrary to the governmental structure for that jurisdiction.

Proceeds (article 26)

In line with the principle that the rules in the draft Convention should not adversely affect existing practices, it should be clearly provided that the rule in this article would not affect the rights of another person in proceeds of the assigned receivable under the law of the assignor's location. In addition to this, to avoid unnecessary complexity and confusion, it should be made clear that this article applies only to cash proceeds and not proceeds in other forms.

Application of chapter V (article 37)

Given that chapter V sets out principles, some of which are not recognised in all legal systems, it is preferable that States be given the choice to opt in rather than have to opt out of the application of this chapter.

Limitation to Government and other public entities (article 38)

This is an important provision for many Governments. The term "*... public entities ...*" is unclear and can be a source of uncertainty. It is not clear, for example, whether this would include State trading agencies which are separately incorporated, or government-linked companies. To address this, it is suggested that States be given an option to identify their "*public entities*" by filing declarations with the depositary.

Effect of denunciation (article 44 (3))

Article 44 (3) binds a State to the terms of the draft Convention even after it has denounced it. In the same way as a State can voluntarily bind itself to the terms of a multilateral convention, it should be able to free itself of the obligations created by such a convention when it feels constrained to do so. A restriction on this principle would render the draft Convention less attractive to States who subscribe strongly to it.

The commercial utility of a provision such as article 44 (3) in the scheme established by the proposed draft Convention cannot be disputed. To maintain the effectiveness of the draft Convention and also to enhance its attractiveness, an appropriate modality would be for this article to provide that a State may declare that, notwithstanding its denunciation of the draft Convention, the terms of the draft Convention shall continue to apply to transactions entered into when that State was a Contracting

State.

SECRETARIAT OF THE INTERNATIONAL INSTITUTE
FOR THE UNIFICATION OF PRIVATE LAW (Unidroit)
(additional comments)

Further to the comments regarding the relationship between the preliminary draft Unidroit Convention on International Interests in Mobile Equipment and the preliminary draft Protocols thereto, on the one hand, and the aforementioned draft UNCITRAL Convention, on the other hand, that it submitted on 14 February 2000 (published in A/CN.9/472/Add.1), the Unidroit Secretariat wishes to inform the Commission of the significant efforts made by the Third Joint Session of the Unidroit Committee of governmental experts for the preparation of a draft Convention on International Interests in Mobile Equipment and a draft Protocol thereto on Matters specific to Aircraft Equipment, and of the Sub-Committee of the ICAO Legal Committee on the study of international interests in mobile equipment (aircraft equipment), held in Rome from 20 to 31 March 2000, with a view to meeting the concerns expressed on that occasion by the representative of UNCITRAL, in particular as reflected in the comments submitted by that Organisation (UNIDROIT CGE/Int.Int./3-WP/10 ICAO Ref. LSC/ME/3-WP/10).

First, the substantive sphere of application of the draft Unidroit Convention on International Interests in Mobile Equipment (hereinafter referred to as "the draft Convention") was considerably reduced during the Third Joint Session, essentially with a view clearly to defining the number of categories of equipment requiring exclusion from the sphere of application of the draft UNCITRAL Convention: the only categories of equipment now covered by the draft Convention are airframes, aircraft engines and helicopters, railway rolling stock and space property (cf. Article 2 (3) of the draft Convention). The sphere of application of the draft Convention may thus no longer be described as being "open-ended" (cf. § 5 of the UNCITRAL Secretariat's aforementioned comments). It is submitted that it should accordingly be that much easier for the Commission to accommodate what the Unidroit Secretariat described as its preferred solution when submitting its comments in February, namely the express exclusion from the draft UNCITRAL Convention's sphere of application of the assignment of receivables that become associated rights in connection with the financing of those categories of equipment covered by the draft Convention.

The Unidroit Secretariat would moreover take this opportunity to reiterate the importance attached by the Unidroit Aviation, Rail and Space Working Groups to assignments of receivables taken as security in aircraft, rail and space financing transactions being dealt with in equipment-specific instruments, namely the draft Convention as implemented by the relevant draft Protocol, rather than in the draft UNCITRAL Convention.

Secondly, the question of the compatibility of Chapter IX of the draft Convention with the rule under certain legal systems that an assignment of associated rights carries with it the interest securing those rights to which the UNCITRAL Secretariat had drawn special attention in its comments was also dealt with by the Third Joint Session. A proposal was developed by three delegations containing two alternatives. Time did not permit the Joint Session to complete its consideration of this proposal. It was, therefore, decided to append it as an annex to the text of the draft Convention as

reviewed by the Drafting Committee. It is, however, our intention, hopefully in early September 2000, to convene a small working group made up of the Governments and Organisations (in particular UNCITRAL), having expressed particular interest in the question during the Third Joint Session, to complete the work in this respect commenced there. It is submitted that, once this work is completed, the concerns expressed by the UNCITRAL Secretariat in this regard will have been satisfactorily dealt with.

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